Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other rules Adopted Pursuant to Section 202 of Of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations In Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

PETITION FOR RECONSIDERATION CONSUMER FEDERATION OF AMERICA AND CONSUMERS UNION

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SUMMARY

The Consumer Federation of America (CFA) and Consumers Union (CU) have been active participants in the media ownership proceeding through all four rounds of comments and in the closely related cable Horizontal Limits Proceeding. We respectfully petition the Commission to reconsider and revise each of the major rules affecting television broadcasting that the Commission has linked together in this omnibus rulemaking. The Order was developed through a flawed administrative process, reflects a partial, selective and faulty reading of the evidentiary record, applies faulty analytic reasoning that is inconsistent with generally accepted principles of antitrust and economic analysis, is riddled with internal contradictions, and is based on a misinterpretation of the law.

Deficiencies in the Process: The decision to allow newspaper-TV cross ownership in the overwhelming majority of local media markets in America is based on a new analytic tool, the Diversity Index, that was pulled from thin air at the last moment without affording any opportunity for public comment. The Diversity Index played the central role in establishing the markets where the FCC would allow TV-Newspaper mergers without any review. It produces results that are absurd on their face. The broadcast ownership rules are based on similarly radical assumptions about the way to measure concentration in those markets that were never revealed to the public prior to the final rule. None of the notices or discussion of TV-TV mergers provides analysis of triopolies. The idea that a single entity would be allowed to own three licenses in a market materialized at the last moment in the final rule and was never subject to public scrutiny or comment.

Failure to Consider Substantial Evidence and Faulty Analysis Underlying the Decision to Relax Broadcast Limits: The Commission arrives at its erroneous decision to raise the national cap on network ownership to 45 percent and to triple the number of markets in which multiple stations can be owned by a single entity because it incorrectly rejected source diversity as a goal of Communications Act. The Commission ignored the mountain of evidence in the record that the ownership and control of programming in the television market is concentrated and extensive evidence of a lack of source diversity across broadcast and non-broadcast, as well as national and local markets. Allowing dominant firms in the local and national markets to acquire direct control of more outlets will enable them to strengthen their grip on the programming market, which undermines diversity and localism. As a smaller number of owners controls a larger share of the market they gain greater and greater leverage in the bargaining with independent producers. The Commission has ignored the evidence that shows that there is a clear link between concentration of ownership and reduced localism and diversity in programming.

The Diversity Index Produces Absurd Results: The easiest way to judge the Diversity Index is by the results it produces. In the New York City area, Shop at Home Incorporated TV, the Dutchess Community College TV and Multicultural Radio Broadcasting Inc. (with three radio stations) each has been given more weight than the New York Times. Again in New York, Univision TV has more weight than ABC Inc., NBC/GE, Viacom or News Corp., even when Viacom's and News Corp.'s radio stations and newspapers are included. Univision is three times

as important as the New York Times. In the Tallahassee DMA, the Thomasville Tribune with daily circulation just under 10,000 per day is given equal weight with the Tallahassee Democrat, with more than 50,000 daily circulation, and twice as much weight as the local CBS affiliate, which has over 50,000 viewers a day, and 59 percent of the TV market.

Faulty Analysis Underlying the Virtual Elimination of the Ban On TV-Newspaper Cross-ownership: This distorted picture of media markets flows from a variety of illogical conclusions and sloppy analyses that riddle the Order. Above all, the FCC ignores the audience of the individual outlets that will actually merge and swap. In other words, the FCC's Diversity Index never considers the actual market share of these media outlets in the market. The FCC decision to abandon this fundamental tenet of sound economic analysis has no basis in the professional literature. The FCC uses a weighting scheme in the cross media analysis that underweights TV and daily newspapers and vastly overweights weekly newspapers, radio and the Internet, giving them more than twice the weight they deserve, because the FCC failed to ask the right questions. In fact, its own experts and the evidentiary record, demonstrated that the Internet should not even be included as a local news source.

Inconsistencies in the Counting of Outlets: The Commission treats the same outlets differently under different rules. The Commission concludes that for purposes of the duopoly rule weaker signals and therefore lesser coverage of UHF stations require them to be discounted. However, it ignores these conclusions when it comes to the cross-ownership rules. In other words, voices that cannot easily be heard and therefore are not counted for the purposes of one set of rules suddenly can be heard and are then counted for the purposes of another set of rules.

Contradictions in the Economic Analysis: The FCC tries to justify abandoning market shares in the cross-ownership rule because entry into the market is easy and the production of news can be expanded at little marginal cost. Yet, in the duopoly rule, mergers were justified for exactly the opposite reason. In other words, in one part of the order news is easy and cheap, in another part it is difficult and expensive. The FCC claims that patterns of usage also support the decision not to rely on market shares. It does so on the basis of claims about the substitution between media. This claim is contradicted by its own data and analysis in other parts of the order. In each of the competition analyses the evidence on competition in advertising media markets indicates that the different media are separate products. In contrast, the FCC claims that the evidence on the use of media for diversity purposes in the marketplace of ideas indicates they are one large market. The econometric evidence in the record supports the opposite conclusion. Substitutability between media for advertising purposes, although not great, is much larger than the substitutability of the media for usage purposes.

Inconsistencies in Market Power Analysis: The FCC concludes that the dominant firms – the top four local stations and the four major national networks – should not be allowed to merge with each other, in part because they form a "strategic group." The FCC identifies a host of dangers in such mergers and little potential public interest benefit from them. The correct public policy conclusion should have been that the dominant firms in the "strategic group" should not be allowed to grow through any merger. This would have created a greater likelihood that new entities could penetrate and weaken the "strategic group." More importantly, each and every one of the reasons given to ban mergers between dominant entities in TV markets is a valid reason to ban a merger between a dominant TV station and a dominant newspaper in the local media market. A merger between a dominant TV station and a dominant newspaper results in an entity that dwarfs its nearest competitors in terms of control of news production. The dominant firm would control a large percentage of the reporters in the market. It would have a diminished incentive to compete (especially across media types), an increased incentive to withhold product, and can leverage its market power in cross promotion. The public interest benefit is likely to be small because these are the most profitable entities in their local market and not likely to add product that promotes the public interest.

Measuring Audiences and Types of Programming is Not Unconstitutional: The FCC declares that measuring audiences or identifying stations that broadcast news and information programming would somehow run afoul of constitutional prohibitions on content regulation. Yet, it admits that much more direct regulation of content – such as a requirement to air a certain amount of a specific type of programming – are constitutional. The mistakes made in the construction of the Diversity Index and the nonsensical results that it produces cannot be blamed on this feeble and incorrect constitutional argument.

The Communications Act and First Amendment Jurisprudence Compels the FCC to Set Higher Standards in Merger Review: The FCC claims that its duty to promote the public interest under the Communications Act is merely to prevent the complete suppression of an idea. The FCC has incorrectly abandoned the principle clearly enshrined in First Amendment jurisprudence and Communications Act policy that its job is to promote "the widest possible dissemination of information from diverse and antagonistic sources." The bold aspiration for the First Amendment sets a high standard under the Communications Act that the Order fails to live up to. The standard for reviewing mergers set by the FCC is far too lax to carry out the purpose of promoting the public interest. The FCC defends its decision to give blanket approval to mergers with reference to the Department of Justice and the Federal Trade Commission *Merger Guidelines.* CFA/CU have shown that because of the importance of mass media in democratic debate and civic discourse, the Communications Act warrants higher standards. Unfortunately, the FCC has gone in exactly the opposite direction. In over half the scenarios for broadcast-newspaper mergers the FCC has offered blanket approval to mergers that would violate the *Merger Guidelines* by a substantial margin. The same is true for TV-TV mergers, with the typical TV-TV merger to which the FCC gives blanket approval violates the *Merger Guidelines* by a factor of five. The Communications Act and First Amendment jurisprudence compel the FCC to protect the public interest much more vigorously.

Blanket Approval of Mergers Undermines the Public Interest: The desire to provide certainty to the industry with a bright line test may be a laudable goal, but it certainly should not trump the public interest standard of the Communications Act. The Commission's repeated claim that the evidentiary record does not support a blanket prohibition on mergers does not justify its rules that are virtually a blanket approval of mergers. It has missed the middle ground of a case-by-case approach with a high First Amendment standard. The imbalance in the Order is further demonstrated by the FCC's decision to afford the industry the opportunity to make the case that mergers banned by it's rules would be in the public interest, but it fails to provide the public the opportunity to demonstrate that mergers that would be allowed are not in the public interest.

I. INTRODUCTION

The Consumer Federation of America (CFA) and Consumers Union (CU) have been active participants in the media ownership proceeding through all four rounds of comments,[1] as well as numerous *ex parte* filings,[2] and in the closely related cable Horizontal Limits

[1] "Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Center for Digital Democracy, Leadership Conference on Civil Rights and Media Access Project," *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking*, MM Docket No. 01-235, 96-197, December 3, 2001, (hereafter, CFA/CU Comments 1); "Reply Comments of Consumers Union, Consumer Federation of America, Civil Rights Forum, Media Access Project, Center for Digital Democracy, and Civil Rights Forum," *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking*, MM Docket No. 01-235, 96-197, February 15, 2002, (hereafter, CFA/CU Reply 1); Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project, and Media Access Project, *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets,* MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244, January 2, 2003 (CFA/CU Comments 2); Reply Comments of Consumer Federation of America, Consumers Union, Center for Digital Democracy and Media Access Project, *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244, January 2, 2003 (CFA/CU Reply 2)

[2] Mark Cooper, *Ex Parte* presentation in Docket No. 02-277, April 18, 2003, Principles Of Market Structure Analysis For Media Based On Economic Fundamentals And The Unique Importance Of Civic Discourse, *Ex Parte* presentation in Docket No. 02-277, March 24, 2003, Principles Of Market Structure Analysis For Media Based On Economic Fundamentals And The Unique Importance Of Civic Discourse, April 24, 2003, *Ex Parte* presentation in Docket No. 02-277, May 21, 2003; Mark Cooper, Principles Of Market Structure Analysis For Media Based On Economic Fundamentals And The Unique Importance Of Civic Discourse, Mark N. Cooper, Promoting The Public Interest Through Media Ownership Limits: A Critique Of The FCC's Draft Order Based On Rigorous Market Structure Analysis And First Amendment Principles, May 2003.

Proceeding.[3] We respectfully petition the Commission to reconsider its recent order in this proceeding.

Each of the major rules affecting television broadcasting that the Commission has linked together in this omnibus rulemaking should be reconsidered and revised.[4] The Order was developed through a flawed administrative process, reflects a partial, selective and faulty reading of the evidentiary record, is riddled with internal contradictions, and is based on a misinterpretation of the law. As described in the comments, the Commission has failed to examine all the relevant data, contradicted much of the data in the record, failed to articulate a rational connection between the facts and the rules, and ignored important aspects of its public policy obligations under the Communications Act.[5]

These flaws occur within the discussions of every rule. The contradictions occur between the justifications presented for each of the rules affects all of the broadcast rules. These inconsistencies and flaws result in an analytic framework that produces unreasonable caricatures of media markets that bear no relationship to the empirical reality of the commercial mass media.

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[3] CFA/CU, Comments 1, p. 2, noted the related nature of the cable horizontal limits proceeding. Comments 2, pp. 200-220 incorporated extensive evidence from that proceeding on program ownership. The Commission has repeatedly made reference to the cable industry and its reports in this proceeding, see for example, *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking*, MM Docket No. 01-235, 96-197, September 13, 2001, p. 6.

[4] Federal Communications Commission, "Report and Order," *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244 July 2, 2003, (hereafter, Order).

[5] *Motor Vehicle Mftrs. Ass'n v. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 43-44 (1980).

The hearing record does not support the radical relaxation of limitations on ownership that the final rules would allow. The resulting rules will not promote the public interest.

II. A FLAWED ADMINISTRATIVE PROCESS

The Federal Communications Commission must reconsider and revise its decision to allow newspaper-TV cross ownership in the overwhelming majority of local media markets in America because it based that decision on a new analytic tool, the Diversity Index, [6] that was pulled from thin air at the last moment without affording any opportunity for comment.[7] Lacking any evidentiary record to support a radical and unconventional approach to market analysis and without the normal vetting of a major change in a proposed rule, the Diversity Index is a grotesque distortion of the market structure analysis routinely conducted by economists. It produces results that are absurd on their face. Yet the Diversity Index played the central role in establishing the markets where the FCC would allow TV-Newspaper mergers without any review. In a lengthy discussion, the Federal Communications Commission (FCC) describes how it used the index to identify markets that would be "at risk" from excessive loss of diversity if such a merger were to take place.[8]

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[6] Order, para. 391, states that "In order to provide our media ownership framework with an empirical footing, we developed a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local markets."

[7] The Administrative Procedures Act (APA) requires that "either the terms or the substance of the proposed rule or a description of the subjects and issues involved" be given public notice (5 U.S.C. s. 553(b). Courts will invalidate rules when an agency fails "to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." (*Home Box Office Inc. v. FCC,* 567 F. 2d 9, 36 (D.C. Cir. 1977).

[8] Order, para. 442.

The FCC incorrectly asserts that CFA/CU was opposed to a Diversity Index;[9] quite the contrary is the case, we just wanted it done right. The record contains numerous discussions that should have forewarned the FCC about the errors that turned up in the Index, as noted below. Had it followed proper procedure and subjected such a radical change in a rule to proper public scrutiny, it would have been better able to understand the mistakes it was about to make.

This infirmity is not limited to the cross-ownership rule. None of the notices or discussion of TV-TV mergers mentioned the word triopolies. The idea that a single entity would be allowed to three licenses in a market materialized at the last moment in the final rule and was never subject to public scrutiny or comment. Moreover, although the broadcast ownership rules do not contain a formal proposal for a radical new index, the analysis of those markets is based upon a similar, radical assumption about the way to measure concentration in those markets. The public should have been afforded the opportunity to comment on this new approach.

The failure to provide the public an opportunity to comment on the dramatically altered rules is compounded by the decision of the Commission to deny the public the opportunity to comments on the individual mergers that it would allow. In violation of s. 309-310 of he Act, the "bright line" standard provides blanket approval to a huge number of potential mergers without affording the public the opportunity to seek review of those mergers.[10] As a further affront to the public's right to comment, the Commission offers broadcasters the right to seek waivers of mergers that would not be allowed by its bright line test, but public does not get to challenge merges that are allowed by the bright line test.[11]

[9] Order, para. 419.
[10] Order, paras. 80-84.
[11] Order, para. 227.

II. FAULTY READING OF THE RECORD ON PROGRAM OWNERSHIP AND THE BROADCAST OWNERSHIP RULES

The Commission must reconsider and reverse it decision to relax the duopoly rule and to raise the national cap on broadcast station ownership because it has inappropriately and incorrectly failed to examine the ownership of programming and ignored the mountain of evidence in the record that the ownership and control of programming in the television market is concentrated. The Commission arrives at it erroneous decision to raise the national cap on network ownership to 45 percent,[12] and to triple the number of markets in which multiple stations can be owned by a single entity because it facilely and incorrectly rejected source diversity as a goal of Communications Act.[13] However, whether we consider source diversity as a separate goal of the Act (which the Commission rejected), or as a subcomponent of the broader concept of viewpoint diversity, the underlying flaw is the failure to analyze the ownership of programs and the important role that independent ownership of programs – independent of ownership of outlets – plays in the media market. The basic problem is easiest to explain if source diversity is treated as a separate goal.

A. SOURCE DIVERSITY PLAYS AN IMPORTANT ROLE

The FCC concluded that source diversity is not a separate goal of its diversity policy. It reached this erroneous conclusion by conflating program production and program distribution, applying a faulty analysis of the economic/business models of program distributors and ignoring extensive evidence that CFA/CU entered into the record. Had the Commission conducted a proper analysis of source diversity, it would have concluded that the 35 percent ownership limit

[12] Order, para. 499.
[13] Order, paras. 42-46, 102-110.

on national networks should not be raised and the limit on local duopolies and triopolies should be much more stringent because the concentration of ownership of outlets undermines diversity by reducing the ability of independent programmers to product content.

Considering the fact that the governing constitutional jurisprudence is focused on source diversity – based on the premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare" – it is remarkable that the Order devotes a scant four paragraphs to the issue. Just as remarkable is the number of errors contained in those scant four paragraphs.

The Order begins its discussion of source diversity in paragraphs 42 by defining it as the "availability of media content from a variety of sources." Paragraph 43 discusses the evidence offered by several commenters about the concentration of production of content that focused primarily on prime time programming, noting that "in 1993, 68% of prime time programming on the largest broadcast networks was independently produced versus 24% today."

With no actual discussion of source diversity, paragraphs 44 and 45 switch from a discussion of source diversity to a discussion of the number of outlets. Paragraph 44 states that "in light of the dramatic change in the television market, including the significant number of channels available to most households today, we find no basis to conclude that government regulation is necessary to promote source diversity." Paragraph 45 goes on to note the increase in channels available to "the vast majority of households" from six in 1979 to an average of 102 channels per home." The Commission claims in paragraph 44 that "Commenters recommending that the Commission adopt source diversity as a goal offer no evidence of the quantity of programming sources across the delivered video programming market (i.e. both broadcast and non-broadcast channels) and why that quantity is deficient." It concludes in paragraph 45 that "given the explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we cannot conclude that source diversity should be a policy goal of our broadcast ownership rule." Virtually identical misreading is repeated time and again throughout the order.[14]

The claim that there is an absence of evidence about concentration in the Delivered Video Programming market could not be farther from the truth. The commenters that the Order identified and several others (who it failed to identify as addressing this issue)[15] provided extensive evidence on precisely the point that the sources of programming are concentrated and therefore lack diversity. It demonstrated this explicitly across "both the broadcast and non-broadcast channels" at both the local and national levels.[16] Perhaps the Commission failed to recognize this evidence because nowhere in the order did it analyze the actual sources of programming. It never did analyze source diversity because it immediately shifted from a discussion of source diversity to a count of outlets, without ever directly analyzing who produces the content that is delivered through those outlets.

In fact, CFA/CU, which the Commission failed to include in its list of commenters who addressed source diversity, presented evidence that directly estimated the lack of source diversity by demonstrating that, at the local level, broadcast and non-broadcast programming is a tight oligopoly (moderately to highly concentrated) across a range of markets.[17]

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[14] Order, paras. 535, 651, 654

[15] Order, para. 43.

[16] CFA/CU, Comments 1, pp. 104-109; CFA/CU, Comments, 2, pp. 153-159, 203-220, CFA/CU, Replies 2, pp. 12-16.

[17] CFA/CU, Comments 1, pp. 104-109; Comments 2, pp. 153-159;

CFA/CU demonstrated that broadcast network owners who have used their must carry/retransmission rights to gain carriage of their programming on cable systems have recaptured between 50 and 75 percent of the viewers that have shifted to cable.[18] Broadcast and non-broadcast programming was closely analyzed and CFA/CU showed that owners of broadcast networks recapture viewers with their non-broadcast offerings. CFA/CU established the concentration of news programming markets at both the national[19] and local[20] levels.

CFA/CU demonstrated that, at the regional and national levels, in the past decade a handful of cable operators and broadcast network owners completely dominate the launch of new cable networks.[21] Looking at subscribers and writing budgets, CFA/CU and others demonstrated that the programming market is a tight oligopoly as well.[22] CFA/CU showed that joint ventures and cross-ownership among and between the members of this oligopoly reduce the incentive to compete and creates shared interests in controlling the flow of programming.[23]

The Commission has some vague idea that the dominant broadcasters now commingle broadcast and non-broadcast activities. Para. 523 offers a hypothetical example of program acquisition that shows that the two largest DVP buyers spend over one quarter of their budgets on cable networks. The fact that the Commission resorted to a hypothetical discussion, rather than analyze the data in the record, alone calls its conclusion "we have no evidence that they

[18] CFA/CU, Replies, pp. 12-16.
[19] CFA/CU, Comments 2, pp. 104-108 155.
[20] CFA/CU, *Ex Parte,* pp. 42.
[21] CFA/CU, Comments 2, pp. 218-220.
[22] CFA/CU, Comments 2, pp.156-158.
[23] CFA/CU, Comments 2, pp. 186-203.

[television stations owners} exercise market power in the program production market"[24] into doubt.

All this is in addition to the high level of concentration in prime time programming, which CFA/CU and others demonstrated in considerably more detail than the Commission acknowledges.[25]

There can be no mistake about the implication and purpose of this analysis, since CFA/CU clearly explained the important role of source diversity in its initial comments in this long running proceeding.

> Source diversity is also meaningless unless the sources are structurally independent. Source diversity references the same fundamental principle--a distinct entity should be responsible for creating content. The First Amendment is served when independent organizations make decisions about what content will be produced, and thus what content will ultimately reach an audience. Source diversity thus makes no sense without separately *owned* sources and distribution mechanisms. Market power in program and content purchasing will eliminate diversity in program production through the exercise of monopsony power. Sources should not only be separate from each other, but also be separate from outlets to prevent the harms of vertical integration.[26]

Ignoring the extensive evidence of a lack of source diversity across broadcast and non-broadcast, as well as national and local markets has dire consequences for the public interest in diversity and localism. As CFA/CU explained at great length in its comments, allowing dominant firms in the local and national markets to acquire direct control of more outlets will enable them to strengthen their grip on the programming market.[27] As the number of independent owners of outlets shrinks, producers have fewer and fewer opportunities to market

[24] Order, para., 517.
[25] CFA/CU, Comments 2, pp. 200-202.
[26] CFA/CU, Comments 1, pp. 30, footnotes omitted.
[27] CFA/CU, Comments 1, pp. 108-113; CFA/CU, Comments 2, pp. 186-200.

their works, especially because the larger program distributors are vertically integrated into program production. As a smaller number of owners controls a larger share of the market they gain greater and greater leverage in the bargaining with independent producers. Indeed, they can make or break programming.[28]

B. VIDEO DISTRIBUTION BUSINESS MODELS ARE NOT PROPERLY ANALYZED

One of the critical factors that the Order has failed to recognize, in spite of this mountain of evidence provided, is that the owners of the broadcast networks are also substantial owners of non-broadcast programming. Contradicting the claim in the Order that there are two very distinct business model in the television markets, CFA/CU and others have shown that the owners of broadcast networks have monetized their must carry/retransmission rights into carriage on cable systems, which provides them with a substantial stream of subscription revenues.

It is truly ironic that the FCC, which routinely notes that rising programming costs are one of the causes of dramatic increases in cable rates,[29] has failed to notice that the owners of many of the programs most frequently cited as the programming cost culprits are the owners of the dominant broadcast networks.[30] Consider paragraph 61 in which the Commission cites the fact that "in competing with broadcasters, non-broadcast programming networks typically have two income streams to develop or purchase programming. Broadcasters continue to rely overwhelmingly on advertising revenues." The three non-broadcast programming networks it cites as examples, ESPN, CNN, MTV are all owned by entities that also own broadcast

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[28] CFA/CU, Comments 2, pp. 206-208.

[29] Federal Communications Commission, "Report on Cable Industry Prices." *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, various issues.

networks. In fact, the three owners of these shows own four of the top six national broadcast networks.

The FCC's discussion of non-broadcast programming in its historical overview reconfirms the error in failing to look at ownership of programming. In paragraphs 102 and 109, the cable network mentioned (HBO, TBS, ESPN, CNN, BET, Nickelodeon, MTV) are owned by corporations that also own networks. The owner of USA, Liberty, has a substantial ownership interest in corporations that own networks. The only independent channel in the list is the Weather Channel.

Even the discussion of broadcast networks in paragraph 110 fails to take note of ownership. Two of the three new networks the FCC touts are, owned by corporations that own another network (UPN), or a major cable operator (WB).

The Commission's observation that the top four broadcast networks have an ownership interest in only 25% of the 102 broadcast channels, misses the point that they have guaranteed access to that distribution and close interconnection through stock ownership and joint ventures to the cable companies that control the remainder of the channels.[31] The joint activities of this cabal has resulted in a video programming market that is a tight oligopoly by all traditional measures of market structure.[32]

In note 1090, the Commission states that broadcast networks are "organizational units of larger media enterprises," but argues that "corporate management ordinarily expects, however, that each business unit will recover its unit-specific fixed and variable costs, contribute to the

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[30] Order, para. 142.
[31] Order, para. 123.
[32] CFA/CU, Comments 2, pp. 203-220.

cost of shared corporate services and functions, and earn unit-specific profit." The Commission presents no evidence specific to the video industry that this is the case. It does not analyze the obvious fact that such a substantial amount of programming purchased for cable networks is likely to generate substantial revenue not in the traditional broadcast mode, nor does it provide any analysis of the joint assets, like studios, that support both broadcast and nonbroadcast programming or the increasing revenue associated with repurposing of programming. The failure to conduct analyses such as these demands that the Commission reconsider its Order in regard to the national cap.

The failure of the FCC to analyze the ownership of programming and to properly understand the economic models being applied in the industry has undermined its analysis of source diversity and led it to incorrectly allow greater concentration of ownership of outlets. For these reasons, the Commission should reconsider the nation cap and restore it the previous level of 35 percent.

C. INDEPENDENT OWNERSHIP OF PROGRAMMING AS AN ASPECT OF VIEWPOINT DIVERSITY

Demonstrating that source diversity should be a focal point of public policy to promote diversity and localism in no way detracts from the simultaneous finding, at which the Commission correctly arrives (para. 27), that "outlet ownership can be presumed to affect the viewpoints expressed on that outlet. We continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners." The difference between viewpoint diversity (measured as the independent ownership of outlets) and source diversity (measured as the independent production of content) is easy to maintain and explain as a basis to promote the public interest in localism and diversity, even if the Commission preferred to view independent program sources as a component of viewpoint diversity.[33]

Owners' viewpoints are expressed in the content they choose to deliver to the public through the outlets they control. The outlet owners may produce their own content or buy it form independent producers. A multiplicity of sources will serve the interests of diversity and localism better by creating competition between sources providing owners a better range of programming from which to choose. More independent source will stimulate greater innovation and creativity and more locally oriented content.[34] Independent programmers can also be expected to produce more vigorous watchdog journalism.[35]

It may also lower the barrier to entry into the media market, since a separate market for independent programming would facilitate entry at one stage of production (programming or distribution) rather than two (vertically integrated production and distribution). The Commission should be well aware of the need to promote source diversity separately from the ownership of outlets, since it accepts higher levels of concentration in mid-size and smaller markets on the basis of a claim about their more demanding economics.[36] Independent ownership of programming could add a significant source of diversity, absent vertical integration.

As demonstrated by CFA/CU in this proceeding, large buyers of programming can exercise monopsony power to the detriment of independent producers and the public, even when they are not vertically integrated, but the problem becomes even more severe when they are

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[33] CFA/CU, Comments 1, pp. 49-52;
[34] CFA/CU, Comments 1, pp. 53-57CFA/CU, Comment 2, 58-59, 79-82.
[35] CFA/CU, Comments 2, pp. 26-27, 83-88.

vertically integrated, which most of the large program distributors are.[37] Structural limits on concentration of ownership of outlets can help to create an environment that promotes independent production of content.

The FCC also fails to recognize the evidence in the record that demonstrates that this buying power in the national market affects diversity in local markets.[38] CFA/CU worked with Joel Waldfogel in the preparation of an econometric study by Joel Waldfogel, who later was hired by the Commission to conduct one of its task force studies that contradicts this claim.[39] This study is one among many cited in our comments that contradict the FCC claim that consolidation into national chains does not diminish diversity.[40]

III. ANALYTIC ERRORS IN THE RELAXATION OF THE BAN ON NEWSPAPER-TELEVISION CROSS OWNERSHIP

A. ILLOGICAL RESULTS

The easiest way to judge the Diversity Index is by the results it produces. The following are some of the results, from the FCC's meager analysis of how the Index would work in only ten markets;

- In the New York City area, Shop at Home Incorporated TV, the Dutchess Community College TV and Multicultural Radio Broadcasting Inc. (with three radio stations) all have more weight than the New York Times.

[36] Order, para. 201.
[37] CFA/CU, Comments 2, pp. 186-220.
[38] Order, para. 534, states that "Commenters do not provide evidence that persuades us to alter those views, and we affirm our 1984 conclusion that the national TV ownership rule is not necessary to promote diversity." The Commission provides no discussion whatsoever of the evidence it has rejected.
[39] CFA/CU, Comments 1, Attachment B. The results of this study were summarized in Waldfogel's statement to the Media Ownership Roundtable conducted by the FCC.
[40] CFA/CU, Comments 1, pp. 40-45; Comments 2, pp. 54-59, 250-253

- Again in New York, Univision TV has more weight than ABC Inc., NBC/GE, Viacom or News Corp., even when Viacom's and News Corp.'s radio stations and newspapers are included. Univision is three times as important as the New York Times.
- In Birmingham, AL, the most important news source is the Internet delivered by telephone companies.
- In Altoona, PA the Fox affiliate, Peak Media, has twice the weight of the NBC and CBS affiliates, even though each of the latter has over four times the audience.
- In Charlottesville, VA, Virginia educational television has more weight than the Daily Progress, the only daily newspaper in town.

There is a pervasive pattern of absurd results flowing from the index. For example we examined the impact of the numerous flaws in the Diversity Index on the analysis and policy recommendations for a set of Designated Market Areas (DMAs) that include the state capitols. These are extremely important local markets for purposes of civic discourse. We find a pervasive pattern of illogical and unrealistic results. Among the most notable we find the following for mid sized markets.

- In the Tallahassee DMA, the Thomasville Tribune with daily circulation just under 10,000 per day is given equal weight with the Tallahassee Democrat, whose more than 50,000 daily circulation and twice as much weight as the local CBS affiliate, which has over 50,000 viewers a day, and 59 percent of the TV market.
- In the Lexington KY DMA, the Corbin Times Tribune with average daily circulation of 5,000 is equal to the Lexington Herald Leaser with avg. daily circulation of 115,000 and 1.3 times as much weight as the CBS duopoly, an average of 66,000 viewers. A top four TV station with 29,000 daily viewers cannot merge with a top four TV station with 17,000 daily viewers, but a TV duopoly with 66,000 avg. daily viewers can merge with a newspaper with 115,000 readers.

Appendix 1 presents the analysis of a dozen other markets. It demonstrates the pervasive pattern of absurdities that result from the Diversity Index. While this detailed analysis of the results of the Diversity Index necessarily followed the release of the final rule (no opportunity for comment having been afforded the public), CFA/CU did enter into the record market structure analyses that reached similar results based on press accounts of what was rumored to be in the index.[41]

If the Diversity Index "informed" the judgment of the Commissioners who voted for it, then they were misinformed about the reality of American media markets.[42] Had the Commission taken a moment to reflect on the results of the Index, as required by law, and analyze a full range of markets and scenarios, it would have understood the flaws in its approach.

B. THE SIZE OF THE AUDIENCE MATTERS A GREAT DEAL IN ECONOMICS AND DEMOCRATIC DISCOURSE

1. Newspaper-TV Mergers

Above all, the FCC has decided to ignore the audience of the individual outlets that will actually merge and swap. In other words, the FCC's Diversity Index never considers the actual market share of these media outlets in the market. Consistently and repeatedly from the initial comments filed in December of 2001[43] until an *ex parte* filed in May of 2003[44] and numerous times in between,[45] the Commission has been cautioned that market structure analysis must start with the analysis of the size of the market share, in the case of broadcasting and newspapers the size of the audience.

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[41] Cooper, *Ex Parte,* May 21, 2003, Promoting The Public Interest Through Media Ownership Limits, pp. 17-23.

[42] Order, para. 433, The FCC asserts that "Based on an analysis of a large sample of markets of various sizes, the Diversity Index suggests that the vast majority of local media markets are healthy, well-functioning and diverse."

[43] CFA/CU, Comments 1, p. 103.

[44] Cooper, *ex parte,* May 21, 2003, Promoting the Public Interest, pp. 37-38.

[45] CFA/CU, Comments 2, pp. 284-288; Cooper, *ex parte*, April 24, 2003, Principles of Market Structure Analysis, pp. 4.

Market shares play the central role in market structure analysis.[46] The FCC decision to abandon this fundamental tenet of sound economic analysis has no basis in the professional literature. Its efforts to justify this radical break with common practices are feeble at best and flat out wrong at worst. It is also inconsistent with much of the analysis in the order.

The most blatant contradiction underlying the Diversity Index occurs within the discussion of the cross ownership rule. The FCC justifies getting rid of the ban on cross ownership on the basis of a discussion of the market share and "influence" of the various media. Yet, when it comes to writing the new rule, it declares that market share and influence do not matter.

In a paragraph labeled *Benefits of Common-Ownership* the FCC claims that cross ownership yields diversity benefits, stating the following:

> A recent study, for example, determined that, on average "grandfathered" newspaper-owned television stations, during earlier news day parts, led the market and delivered 43% more audience share than the second ranked station in the market and 193% more audience than the third ranked station in the market.[47]

In a paragraph labeled *Harm to Diversity Caused by the Rule*, the Commission claims that the newspaper cross ownership ban harmed diversity. It again made direct reference to market shares:

> Newspapers and local over-the-air television broadcasters alike have suffered audience declines in recent years. In the broadcast area, commenters have reported declines in the ratings of existing outlets as more media enter the marketplace. For example, the number of television stations in the Miami-Ft.

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[46] Shepherd, William G., *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985); Scherer, F. Michael and David Ross, *Industrial Market Structure and Economic Performance* (New York: Houghton Mifflin Company, 1990);Viscusi, W. Kip, John M. Vernon, and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* (Cambridge: MIT Press, 2000).

[47] Order, para. 357.

> Lauderdale and the adjacent West Palm Beach markets has increased from 10 to 25 from 1975 to 2000. As more stations have begun to program local news, however, the ratings for individual stations have dropped. Broadcast groups owned by GE, Disney, Gannett, Hearst-Argyle and Belo have lost 10 to 15% of their aggregate audience in the past five years. Local over-the-air broadcast TV's share of total television advertising dollars, which includes the new broadcast networks, new cable networks and syndication providers, has fallen from 56% in 1975 to 44% in 2000. E.W. Scripps Company argues that consolidation among established media outlets and the proliferation of new media outlets since 1975 requires broadcasters and newspapers to grow, consolidate, and achieve critical scale in their local markets to survive and effectively serve the public.[48]

It is not the number of stations that matters most, but the loss of market share or audience that is the driving force in the argument.

> Given the decline in newspaper readership and broadcast viewership/listenership, both newspaper and broadcast outlets may find that the efficiencies to be realized from common ownership will have a positive impact on their ability to provide news and coverage of local issues. We must consider the impact of our rules on the strength of media outlets, particularly those that are primary sources of local news and information, as well as on the number of independently owned outlets.[49]

How does one measure the strength of media outlets, but by their audience size?

The FCC goes on to assert that "Given the growth in available media outlets, the influence of any single viewpoint source is sharply attenuated."[50] How does one measure the influence of an outlet, but by its audience size? The FCC presents no measure of influence or evidence of its "sharp attenuation" other than market share and audience data.

Having relied extensively on market shares in declaring that the blanket prohibition on cross-media mergers cannot be sustained, the FCC then refuses to incorporate the audience of outlets into the Diversity Index. Instead, the FCC assumes, contrary to fact, that all outlets within each medium are equal in size.

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[48] Order, para. 359.
[49] Order, para. 360.

> We have chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal market shares.[51]

This counterfactual assumption is what opens the door to the absurd results. The FCC assumes, incorrectly, that each TV station has the same strength and influence as every other TV station in the market. It assumes that each newspaper has the same strength and influence as every other newspaper in the market. It assumes that each radio station has the same influence and strength as every other radio station in the market.

2. TV-TV Mergers

The FCC's schizophrenia about market shares and audiences is not limited to the Diversity Index. Similar inconsistencies afflict its decision to expand the scope for TV-TV mergers in local markets. Paragraph 193 declares that the local TV merger rule will be based on outlets since "the number of licenses that a firm controls in a market is the measure of its capacity to deliver programming." However, in paragraph 194, it immediately justifies allowing mergers in terms of audience, not outlets, declaring that "same-market combinations have resulted in an increase in viewership of the lower-ranked of the two stations in the combination, evidencing a welfare enhancing effect for consumers."[52] Paragraph 194 goes on to observe that "there is a general separation between the audience shares of the top four-ranked stations and the audience shares of other stations in the market" and to claim that "although the audience share of the top four-ranked stations is subject to change and the top four ranked sometimes swap positions with each other, a cushion of audience share percentage points separates the top four

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[50] Order, para. 366.
[51] Order, para. 420.

and the remaining stations, providing some stability among the top four-ranked firms in the market."

Paragraph 196 links local market shares to the fact that the "Big Four networks continue to comprise a "strategic group." What the FCC has described in terms of market share is a tight oligopoly, sustained over a very long time. It has presented no evidence, nor is there any in the record to support its claim that "[I] such a market, a firm's market share is more fluid and subject to change than in other industries."[53] If the Commission intended to promote greater diversity and competition, it should have prevented any mergers involving any of the members of the strategic group. This would have encouraged non-members of that group to gain size and weaken the strategic group dominance. CFA/CU suggest this approach in an *ex part.*[54]

C. Media Weights

The FCC attempts to put a façade of market structure analysis on the Diversity Index by assessing the importance of each medium, rather than each firm. That is, while it treats all TV stations equally, no matter how many people view them, it did assign different weight to TV as a medium than newspapers, radio or the Internet. All TV stations are treated equally because they use the same technology to broadcast.[55]

A weighting scheme may have been necessary for cross media policy setting, but the FCC got the weights completely wrong. It underweights TV and daily newspapers and vastly

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[52] CFA/CU, Reply 1, p. 22-25 pointed out that the market share of the second station is not, in itself, a measure of welfare enhancement for the total market unless it can also be shown that total viewing increased.

[53] Order, para. 193.

[54] Cooper, *ex parte,* May 21, 2003, Promoting the Public Interest, p. 38.

[55] Order, para. 422, "We believe that the overall impact of a medium is substantially determined by the physical attributes of its distribution technology, along with user preferences."

overweights weekly newspapers, radio and the Internet, giving them more than twice the weight they deserve. In fact, its own experts and analysis, not to mention the evidentiary record, demonstrated that the Internet should not even be included as a local news source.[56]

In one sense, the FCC got the media weights wrong for the most mundane of reasons – it did not ask the right questions. The agency failed to ask the proper questions on its survey instrument and chose not to conduct a second survey.[57] It then combines questions that distort the weights. It cites other surveys to support some of its analytic conclusions, but does not notice that those same surveys contradicted its much more important assumptions and choices.

The FCC attributes an importance to radio that it has not had in decades.[58] It overweights the Internet and weekly newspapers. The weights produce results that defy common sense because the FCC conducted sloppy research and selective analysis of the data it consulted.

The FCC asked respondents "What single source do you use most often for local and national news and current affairs?"[59] This question gets directly at the relative importance of the news sources. Unfortunately, the FCC did not ask the question about local news only.

The FCC fell back on a much weaker question for local news: "What source, if any, have you used in the past 7 days often for local news and current affairs?" [60] This was an open question in which respondents were allowed multiple responses. Sources they mention here

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[56] MOWFG, Study 3, pp. 19, notes that cable and Internet "do not originate locally."

[57] Order, para. 410, "Unfortunately, we do not have data on this question specifically with regard to local news and current affairs."

[58] CFA/CU, Comments 1, pp. 80, Comments 2, pp. 102.

[59] Nielsen Media Research, *Consumer Survey On Media Usage* (Media Ownership Working Group Study No. 8, September 2002) (hereafter, MOWG), question no. 10.

[60] MOWG, Study No. 8, question no. 1.

clearly came to their minds. One might infer that what they recall reflects the importance of the sources to them.

Unfortunately, the FCC did not accept these responses. It then followed up with a prompted question directed only at those who did not mention a source.[61] The FCC asked those people who failed to mention a source whether they had used it. The FCC then combined the answers to the two questions, giving them equal weight. This approach was certain to overweight the less prevalent sources by asking many more people about those sources a second time with a prompted question.

In the course of justifying its decision not to include magazines in the final weighting, the FCC cites Pew Center studies in support of this decision.[62] The Pew studies also had a great deal of useful information about all sources of news and information, but the FCC chose to ignore it.

Table 1 translates the responses to four questions (two from Pew and two from the FCC) into weights according to the methodology used by the FCC. It contrasts the results to the Diversity Index weightings. The two Pew questions on campaign sources and the FCC question on most important sources of news all yield very similar results. The TV weight is in the range of 55 – 60, almost twice the weight given it by the FCC. The newspaper weight is in the range of 24 to 28, equal to the FCC weight. The radio weight is in the range of 10 to 11, less than half the weight given it by the FCC. The Internet is in the range of 5 – 6, less than half the weight given it by the FCC.

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[61] MOWG, Study No. 8, question no. 2.

[62] Order, para. 407, citing PEW, *Internet Sapping Broadcast News Audience* (June 11, 2000), para. 417, citing Pew Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers* (Apr. 27, 2003).

Table 1: Weights Based On Various Questions About The Importance And Use Of Media Sources For Local And National News And Current Affairs

QUESTION	WEIGHTS TV	Papers	Radio	Internet
FCC Diversity Index [a/]	33.8	28.8	24.8	12.5
PEW QUESTIONS				
How have you been getting most of your[b/] news about the presidential election campaign?	60.5	25.5	9.7	4.8
How do you get most of your news about the[c/] election campaigns in you state and district?	55.5	27.8	10.9	5.9
FCC QUESTIONS				
What single source do you use most often for[d/] local or national news and current affairs.	58.8	24.4	10.5	6.2
What source, if any, have you used in the past[e/] 7 days for local news and current affairs?	42.0	31.1	17.5	9.3

Sources:
a/ Federal Communications Commission, "Report and Order," In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Dockets 02-235, 01=317, 00-244, July 2, 2003, at para. 415.
b/ Pew Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers* (Feb. 5, 2000), q. 13.
c/ Pew Center for the People and the Press, *Modest Increase in Internet Use for Campaign 2002* (Jan. 5, 2003), q. 17.
d/ Nielsen Media Research, *Consumer Survey On Media Usage* (Media Ownership Working Group Study No. 8, September 2002) question no. 10.
e/ Media Ownership Working Group Study No. 8, question no. 1.

The FCC's failure to ask the proper questions about the importance of local news source also undermines it ability to set the weights for daily newspapers compared to weekly newspapers. Relying on the question about any source of local news, the FCC establishes a ratio of 2.5 to 1 between dailies and weeklies. The problem here should be evident. Asking people whether they had referred to a source any time in the past seven days and then giving equal weight to dailies and weeklies misses the obvious point that weeklies come out once a week and dailies come out five, six or seven times. Many people get as many as seven dailies to one weekly. If we divide the weekly responses by 7, we conclude that dailies should be weighted 11.5 times weeklies. Interestingly, when the FCC asked about the most often used source, dailies were mentioned 12.2 times as often as weeklies.

Moreover, the FCC analysis only looks at the demand side of the market. Newspapers play a much larger role on the supply side. They employ many more reporters and newsroom staff and produce many more and much longer news stories than TV or radio. The typical market has just under four TV stations broadcasting news, just over two newspapers, and nine radio stations doing news. Based on data we filed in the record, on a national average basis, we estimate 130 newspaper newsroom staff; 95 TV newsroom staff; and 27 radio newsroom staff per market.[63] This further supports the view that the FCC has overweighted radio.

The failure of the FCC to take the time to ask the right question in the case of the cross ownership rule and the decision to base it Diversity Index on one flawed questions flies in the face of the D.C. Circuit Court's explicit admonition to establish an evidentiary basis for its rules.[64] In the case of the national cap, the Commission identifies specific evidence that would have formed a much stronger record,[65] but failed to do so. Here it bears a special burden, since Congress established the 35 percent cap.

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[63] CFA/CU, Comments, 1, p. 77.
[64] *Sinclair Broadcasting, Inc. v. FCC,* 284 F.3d 148 (D.C. Circ. 2002), p. 15
[65] Order, para. 560.

IV. INCONSISTENCIES BETWEEN THE RULES

A. COUNTING OF OUTLETS

The equal market shares assumption conflicts with another set of analyses in the order. In the discussion of both the television and radio ownership limits, the Commission presents an extensive discussion of coverage or reach of the outlets, but presents no such analysis of newspapers. Worse still, it concludes that signals that cannot be easily received for purposes of the TV ownership limits should be discounted. It concludes that radio signals must be analyzed in small markets because of their limited strength for purposes of the radio ownership limits.

This discussion leads to important decisions in both cases. For example, the Commission concludes that the weaker signal and therefore lesser coverage of UHF stations require them to be discounted.[66] The FCC counts UHF stations at 50%,[67] even though 70 percent of Americans subscribe to cable and UHF stations have must carry rights.[68] Moreover, although the FCC has declared it will sunset the UHF discount for the major networks when the transition to digital TV is complete, at whatever date in the far distant future that may be, it will continue to apply the discount to several major national networks.[70] The FCC also concludes that the smaller Arbitron areas are more appropriate for the radio analysis.[71]

However, it ignores or forgets these conclusions when it comes to the cross-ownership rules. In other words, voices that cannot easily be heard and therefore are not counted for the

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[66] Order, paras. 187, 230.
[67] Order, para. 500.
[68] Order, para. 146.

[70] Order, para. 591.
[71] Order, paras. 273-274.

purposes of one set of rules suddenly can be heard and are then counted for the purposes of another set of rules.

In the cross ownership rule, it engages in no such analysis. The FCC does not analyze the coverage of newspapers and it forgets about its coverage analysis for TV and radio.[72] UHF stations are not discounted and all radio stations are assumed to cover the entire DMA.[73] It is blatantly contradictory to assume that a signal that does not reach a viewer/listener for purposes of competition analysis and the media specific ownership rules somehow magically reaches them for purposes of the diversity analysis under the cross-ownership rule.

B. Economic Analysis

The FCC tries to justify abandoning market shares in the cross-ownership rule with an economic argument. The audience shares of the dominant mass media do not matter, we are told, because entry into the market is easy and the production of news can be expanded at little marginal cost. This claim is simply wrong, contradicted by the evidence before the Commission and even by the Commission's own words.

The Order states that "This point has particular force when dealing with competition in the marketplace of ideas because media outlets can rapidly expand their distribution of content (including local news and current affairs) at very low marginal cost." Yet, in the discussion of the need to relax the duopoly rule, the Commission reaches the exact opposite conclusion,

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[72] CFA/CU, Comments 2, pp. 172, noted that the coverage of newspapers is much smaller than the DMA.

[73] Order, paras. 429-430.

stating, "Moreover, rising news production costs and other factors may cause broadcasters to turn to less costly programming options."[74]

A look at the empirical facts about trends in the industry before the Commission reinforces this view. There has been almost no entry into the business of publishing daily newspapers, the mainstay of print journalism, in decades. The record shows that the number of papers and owners has been shrinking, not expanding.[75] Entry into the TV business has also not taken place at the level of ownership. Although the number of full power stations has increased, the number of owners has declined sharply.[76] Moreover, the number of stations providing news has declined slightly.[77] However, the FCC acknowledges that the important public policy goal it to encourage entry by new owners, since owners control the electronic voices of the outlets. The claim that ownership entry is easy at the level of long-term competition (i.e. sinking new capital into the market) is not supported by the record.

The FCC might claim that it is addressing the marginal cost of expanding news production for stations already doing news, which it deems to be low. At least for these stations the marginal cost of expanding output, although not low, would not involve starting a whole news department. If this were the argument on which the FCC was relying, it should have counted only broadcast stations that currently provide news in its index and not those stations that do not. It did not make this distinction. We have pointed out in our filings at the Commission that market structure analysis based on a news voice count yields a result similar to

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[74] Order, para. 167.
[75] CFA/CU, Comments 1, pp.77.
[76] Notice, pp. 1, CFA/CU, Comments 1, pp. 77.
[77] CFA/CU, Comments 1, pp. 77.

market structure analysis based on market shares.[78] The reason is simply that the stations with small market shares do not contribute much to the total Hirshman Herfindahl Index (HHI, which is the FCC's preferred measure of concentration) they are also less likely to do news.

However, the actual language used by the FCC to describe the cost of news production will not allow it to get away with this dodge. There is no doubt that the difficulty and expense of news production stems from its variable costs, not its fixed costs.[79]

The FCC's economic analysis is also inconsistent in its discussion of substitutability. The FCC claims that patterns of usage also support the decision not to rely on market shares.[80] It does so on the basis of claims about the substitutions between media. This claim is contradicted by its own data and analysis in other parts of the order.

In each of the competition analyses the evidence on competition in advertising media markets indicates that the different are separate products. In contrast, the FCC claims that the evidence on the use of media for diversity purposes in the marketplace of ideas indicates they are one large market. The econometric evidence in the record supports the opposite conclusion. Substitutability between media for advertising purposes, although not great, is much larger than the substitutability of the media for usage purposes.[81]

C. MARKET POWER ANALYSIS

The failure to conduct a rational market structure analysis for purposes of the cross ownership rule draws the FCC into a broad range of contradictions with the other rules at the

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[78] Cooper, *ex parte,* May 21, Promoting the Public Interest, p. 42.

[79] Order, para. 167.

[80] Order, para. 399, cites Media Ownership Working Group Study No. 3 to the effect that "the record contains evidence that most people can and do substitute among different media for news and information," Para. 423, claims that current usage is not a predictor of future usage.

level of policy. Based on sound market structure analysis of the local and national television markets, the FCC concludes that the dominant firms – the top four local stations and the four major national networks – should not be allowed to merge with each other. The FCC identifies a host of dangers in such mergers and little potential public interest benefit from them.

According to the FCC, such mergers would increase economic market power,[82] create dominant firms that are much larger than their nearest rivals,[83] who could distort the market for inputs available to other distributors of content,[84] and diminish the incentive to compete.[85] Furthermore, there is likely to be little public interest benefit from dominant firm mergers because the merging parties are likely to be healthy and already engaged in the production of news and information products. [86]

Each and every one of these reasons given to ban mergers between dominant entities in TV markets is a valid reason to ban a merger between dominant TV stations and newspapers in the local media market. A merger between a dominant TV station and a dominant newspaper results in an entity that dwarfs its nearest competitors in terms of control of news production.[87] The dominant firm would control a large percentage of the reporters in the market.[88] It would also have a sufficiently large cross-media presence to diminish the antagonism between print and

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[81] CFA/CU, Comments 2, pp. 130-150.
[82] Order, paras. 197, 604.
[83] Order, paras. 195, 608.
[84] Order, paras. 602, 605.
[85] Order, paras. 196, 200, 608.
[86] Order, paras. 197, 198, 611.
[87] Cooper, *ex parte*,
[88] CFA/CU, Comments 1, pp. 77, Cooper, *ex parte,* May 21, 2003, Promoting the Public Interest, pp. 19.

video media, thereby reducing competition.[89] It would have a diminished incentive to compete (especially across media types), an increased incentive to withhold product, and can leverage its market power in cross promotion.[90] The public interest benefit is likely to be small because these are the most profitable entities in their local market and not likely to add product that promotes the public interest.[91] Indeed, the synergies sought are likely to diminish the total resources available for news production.[92]

D. Evaluating the Costs and Benefits of Consolidation

By citing the inconsistent treatment of the costs and benefits of dominant firm mergers in the different rules, we do not suggest that the FCC has properly evaluated that issue. In fact, there is another fundamental inconsistency in the way the Commission reads the evidence on the impact of mergers. The FCC tends to give great weight to the anecdotes and claims of media outlet owners about the qualitative benefits of mergers and the quasi-quantitative studies introduced into the record, but ignore the much better documented case studies of the qualitative harm of such mergers and the rigorous critique of ill-conceived and badly executed quantitative studies.[93]

In its comments CFA/CU presented numerous case studies of qualitative harm resulting from media mergers both within the broadcast industry[94] and across media types.[95] These were

[89] CFA/CU, Reply 1, pp. 62-64, 76-81; Comments 2, pp. 227-234.
[90] CFA/CU, Reply 1, pp. 40-44.
[91] CFA/CU, Reply 2, pp. 22-24.
[92] CFA/CU, Comments 2, pp. 221-224; 246-254.
[93] Order, paras. 158, 160, 163.
[94] CFA/CU, Comments 2, pp. 203-209.
[95] CFA/CU, Comments 2, pp. 227-234.

in addition to the case studies of newspaper only,[96] or radio only case studies,[97] which the FCC incorrectly dismisses as irrelevant.[98]

CFA/CU also demonstrated that the claims of quantitative superiority of merged companies were based on faulty analysis. All of the studies of quality founder on their inability to present statistical controls for crucial explanatory variables. They failed to control for the size of the outlets[99] or the size of the markets in which the merged outlets are located.[100] The studies of the quantity of or new produced suffer from similar problems of a lack of statistical validity. The one case where a before and after comparison involving merged and non-merged outlets was possible on the basis of the data, CFA/CU demonstrated that merged stations were not likely to air more news.[101] None of this criticism is reflected in the Order.

The treatment of the study from the Project for Excellence in Journalism is an example of the biased treatment of evidence. In the cross-ownership rule the FCC (para. claims that its "conclusions are supported by a study done by the Project for Excellence in Journalism ("PEJ") in which PEJ analyzed five years of data on ownership and news quality. PEJ concluded that cross-owned stations in the same Nielsen Designated Market Area were more than twice as likely to receive an "A" grade as were other stations. On the whole, cross-owned stations were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human-interest features. In a footnote it points out that "Elsewhere in this *Report and Order*, we determine that the results of the PEJ

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[96] CFA/CU, Comments 2, pp. 250-262.
[97] CFA/CU, Comments 2, pp. 13.
[98] Order, para. 158, 163.
[99] CFA/CU, Reply 2, pp. 23.
[100] CFA/CU, Reply 2, pp. 26.

study are statistically insignificant and cannot be considered reliable or convincing evidence. *See* National TV Ownership Rule Section VII (A), *infra*. We use PEJ's filing here solely as a source of anecdotal evidence, not as a statistical study, and do not base our conclusions regarding the newspaper/broadcast cross-ownership rule upon it." Thus, although the study is flawed, the Commission offers it as anecdotal evidence in support of its view.

In the national cap rule, the findings of the study cut against the direction the Commission wants to go, but here the Commission does not cite it as anecdotal evidence. Here it chose to only criticize the study, pointing out that (para. 573). "Whether or not the PEJ Study is unbiased, its results appear statistically insignificant, the underlying data have not been made available, and therefore it cannot be considered reliable or convincing evidence." In fact, statistically speaking, the results the FCC rejected (contradicting its view) are stronger than the results it offered as anecdotal support for its point of view. The one statistically significant finding in the study is that smaller groups received higher quality grades, which also certainly cuts against raising the national cap.

V. FLAWED LEGAL ANALYSIS UNDERLYING THE RULES

A. ENQUIRING ABOUT AUDIENCE AND LOCAL NEWS AND INFORMATION PROGRAMMING IS NOT TANTAMOUNT TO PROHIBITED CONTENT REGULATION

The FCC offers two general legal arguments as to why it cannot or should not use market shares in its construction of a Diversity Index. These simply do not withstand scrutiny.

[101] CFA/CU, Reply 2, pp. 20-23.

The FCC declares that basing the Diversity Index on market shares or audiences would run afoul of constitutional prohibitions on content regulation.

> If we were to adopt a usage measure designed to reflect our concern with local news and current affairs, we would need information on viewing/listening/reading of local news and current affairs material. To implement this procedure, it would be necessary first to determine which programming constituted news and current affairs. We believe that this type of content analysis would present both legal/Constitutional and data collection problems.[102]

The claim is completely unfounded and contradicted by extensive analysis conducted throughout the order.

First, it recognizes its constitutional authority to deal with types of programs in the case of children's programming.[103] In that instance, the Congress is prescribing a quantity of programming to be aired. If such a policy passes constitutional muster, then merely counting the quantity of programming stations choose to add is no threat to the First Amendment.

Moreover, the FCC declares at the beginning of the order that news and information should be the focus of its analysis.[104] In the cross ownership discussion it cites studies of local news and information shows that it claims demonstrate that removing the ban will promote the public interest.[105] In the discussion of the duopoly rule it presents extensive discussions of the quality and content of local news an information programming.[106] The does a lengthy analysis of merger impacts based on the simple question of whether a station does or does not originate local news shows.[107]

[102] Order, para., 420.
[103] Order, para., 183.
[104] Order, para., 32, 78.
[105] Order, para., 343, 344.
[106] Order paras. 157-164.
[107] Order, para. 198.

In justifying the ban on mergers between top four stations in a market, the FCC relies on the fact that 85% of the top four firms originate local news.[108] In contrast, only 19% of the remainder of the stations broadcast news. It concludes that banning top four mergers and allowing other mergers has a high probability of promoting the public interest since this reduces the chances of "losing" an independent source of news.

When it comes to the definitions of the Diversity Index, however, it suddenly and incorrectly claims that it cannot identify local news programming without straying into content regulation, which is frowned upon by First Amendment jurisprudence. How can it discover at the end of the order that all this analysis, upon which it relied in determining local impact of various media ownership rules, is suddenly constitutionally suspect for establishing a new set of rules?

B. THE COMMUNICATIONS ACT AND FIRST AMENDMENT JURISPRUDENCE COMPELS THE FCC TO SET HIGHER STANDARDS IN MERGER REVIEW

The FCC also claims it can, or should, ignore the size of the audience because the purpose of diversity policy is only to prevent the complete suppression of ideas. If an idea can get out into the public through any means of communications, diversity has been served, in the FCC view.[109] CFA/CU presented extensive legal analysis that shows this interpretation is incorrect.[110] The FCC has given up all pretense of ensuring a broad opportunity for ideas to circulate and will allow owners of the electronic media outlets to amass huge audiences by buying dominant newspapers and leading TV stations. The FCC has abandoned the principle that

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[108] Order, para. 198.
[109] Order, para. 420.
[110] CFA/CU, Comments 1, pp. 7-35, CFA/CU, Comments 2, pp. 155, 200; CFA/CU, Reply 2, pp. 8.

First Amendment policy should promote “the widest possible dissemination of information from diverse and antagonistic sources.”[111]

The outlet count methodology it uses fails to reflect First Amendment jurisprudence in another critical manner. Throughout the order, it presents only a listener analysis, but never a speaker analysis. For example, in its market-by-market analysis it counts the number of owners, but never the size of the population they serve,[112] even though the underlying study provided the data necessary to do so.[113] CFA/CU argued that the make-up and size of the population served should be considered since it gives some perspective on the chances that an individual citizen would have the chance to speak through an electronic voice,[114] as well as the increasingly diverse needs of an increasingly diverse population.[115] “When we recognize that citizens are speakers, as well as listeners, we need to look at the availability of media on a per capita (or per households) basis since this affects the chance that an individual will have the opportunity to be heard and influence the opinions of his or her fellow citizens.[116]

This view is certainly more consistent with the First Amendment broadcast jurisprudence that broadcasters do not have “unabridgeable rights” in their licenses. This conclusion is

[111] Order, para. 353. The cited First Amendment policy was first established by the Supreme Court in Associated Press v. United States, 326 U.S. 1, 20 (1945), and has been consistently reaffirmed since then.
[112] Order, paras, 98, 107, 121.
[113] MOWG Study, No. 1. Table 4.
[114] CFA/CU Comments 1, p. 80; CFA/CU, Comments 2, pp. 179-183.
[115] CFA/CU Comments 1, p. 8-10; CFA/CU Comments 2, pp. 32-34, 94-98.
[116] CFA/CU Comment 2, p. 177.

typically linked to a specific concept of scarcity that looks at citizens not simply as listeners, but also as speakers.[117] Thus, in *Red Lion* the court notes that

> where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.[118]

The disproportion between speakers and available voices has been repeated in subsequent court cases as the primary concern of the court. The failure of the FCC to present any empirical analysis of the media from the point of view of citizen speakers undermines it analytic framework and legal conclusions.

1. Newspaper-TV Mergers

The bold aspiration for the "widest possible dissemination of information from diverse and antagonistic sources" that pervades First Amendment jurisprudence sets a high standard under the Communications Act that the Order fails to live up to. Not only is the FCC method for assessing the concentration of media markets flawed, but the standard for reviewing mergers is far too lax to carry out the purpose of promoting the public interest.

The FCC defends its decision to give blanket approval to mergers with reference to the Department of Justice and the Federal Trade Commission *Merger Guidelines.* Under these *Guidelines,* mergers that would increase the HHI by 100 points in a market that is moderately concentrated after the merger are a source of concern. Mergers that increase the HHI by more than 50 points in a market that is highly concentrated after the merger are a source of concern. These mergers are subject to close scrutiny because they raise concern about the exercise of

[117] Cooper, *ex parte,* May 21, 2003, "Promoting The Public Interest Through Media Ownership Limits," pp. 12.

[118] 395 U.S. 388 (1969).

market power. CFA/CU has shown that because of the importance of mass media in democratic debate and civic discourse, the Communications Act warrants higher standards.[119]

Unfortunately, the FCC has gone in exactly the opposite direction (see Table 2). In over half the scenarios for broadcast-newspaper mergers the FCC has offered blanket approval to mergers that would violate the *Merger Guidelines* by a substantial margin. All

Table 2: FCC Blanket Approval Of Mergers That Violate The *Merger Guidelines*

(Underlined Bold Violate DOJ/FTC *Guidelines*)

Base Case		Average Change in Diversity Index, Resulting from Mergers			
TV Stations In Market	Average Diversity Index	Newspaper and Television	Newspaper, TV, and ½ Radio	Newspaper and TV Duopoly	Newspaper, Radio, and TV Duopoly
4	928	<u>**242**</u>	<u>**408**</u>	----	----
5	911	<u>**223**</u>	<u>**393**</u>	<u>**376**</u>	<u>**846**</u>
6	889	<u>**200**</u>	<u>**340**</u>	<u>**357**</u>	<u>**688**</u>
7	753	121	<u>**247**</u>	242	<u>**533**</u>
8	885	<u>**152**</u>	<u>**314**</u>	<u>**308**</u>	<u>**734**</u>
9	705	86	207	172	<u>**473**</u>
10	635	51	119	101	292
15	595	48	145	97	302
20	612	40	128	80	350

the market/merger scenarios underlined in bold in Table 2 violate the threshold of a 100-point increase in the HHI. The FCC is giving blanket approval to mergers that would raise alarms and receive case-by-case scrutiny under the anti-trust laws.

Moreover, the FCC has made it clear by drawing a sharp distinction between diversity analysis and competition analysis that the antitrust authorities cannot carry out the necessary

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[119] CFA/CU, Comments 1, pp. 7-21; CFA/CU, Comments 2, pp. 20-39; CFA/CU, Reply 2, pp. 29-38, demonstrating the fallacy of the narrow view offered by broadcast network owners.

analysis under the antitrust laws. The Diversity Index, which combines commercial mass media that are not economic substitutes in any sense, would be totally alien to the antitrust officials.

The possible impact of the blanket approval of mergers on the Birmingham market is shocking. Birmingham ranks in the top quintile of both the TV and radio markets. Thus, it is well above the national average. Yet, the FCC would allow a string of newspaper-TV mergers and TV-TV mergers under the blanket approval policy that could raise the HHI by almost 900 points.[120] This would render the total media market well up into the moderately concentrated range. Over 400 points of the increase come from the newspaper-TV mergers. The largest entity in the market would control over half the reporters in the market. Yet, under the FCC blanket approval approach, every one of these mergers would be approved without any scrutiny.

This incredible increase in concentration of media sources takes place under the distorted FCC Diversity Index. The results in the real world, where media outlets have audiences, would be even more grotesque.[121] CFA/CU showed that in at least half of the cities in which the FCC gives blanket approval to newspaper –TV mergers, a dominant firm merger would raise the HHI by 1000 points or more. Even a merger between a dominant newspaper and the 4th ranked TV station would raise the HHI by over 250 points.

2. TV-TV Mergers

This fundamental misreading of the Communications Act is not limited to the newspaper-TV cross ownership rule. It applies to the local and national TV ownership rules as well. The

[120] In this analysis we assume the number one TV station buys the number one newspaper and the maximum number of radio stations. The number two TV station forms a duopoly with the largest available TV station and acquires the maximum number of radio stations. The process continues until no more TV mergers are allowed.

[121] Cooper, *ex parte*, May 21, 2003, Promoting the Public Interest Through Media Ownership Limits, pp. 27-34.

FCC sets a equally low standard for broadcast markets claiming that " [b]y ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every market, thereby ensuring that out diversity goal will be promoted."[122] Several are not enough, even by antitrust standards, and the number chosen by the FCC is only four since the FCC declares that "no combinations will be permitted in markets with fewer than five television stations."[123] Even if the four TV stations had equal market shares, the local TV market would be highly concentrated – and HHI of 2500. In other words, program producers are condemned to confront a very tight oligopoly.

Although the analysis of TV-TV mergers is not as extensively discussed, it is based on the same incorrect view of concentration.

The FCC's example of the average difference between the fourth and fifth firms in the market, gives the impression that such a merger would not be a problem. The HHI would go up only 224 points, in a market that is at least moderately concentrated. In this case it only violates the merger guidelines by a factor of 2.5 times.[124] In fact, the majority of such markets are highly concentrated, so this violates the *Merger Guidelines* by a factor of five. This is an increase in market concentration that deserves scrutiny, not blanket approval.

However, a more interesting point to consider is the worst merger to which it would give blanket approval, in the least concentrated markets. The FCC cites record evidence on New

[122] Order, para. 129.
[123] Order, para. 134.
[124] Order, para. 195, offers an example of a market in which the fourth firm has a 10 percent market share and the fifth firm has an eight percent market share. A merger between the two would raise the HHI by 224 point.

York and Los Angeles,[125] which are among the least concentrated markets in the nation, although still moderately concentrated.[126] If the largest firm in the market (a duopoly) merged with the fifth largest firm, a merger that is given the blanket approval of the Commission, the HHI would increase by 675 points in New York and 500 points in Los Angeles. We have shown that both of these TV broadcast markets are moderately concentrated.[127] In these two markets such a merger violates the guidelines by more than a factor of five.

The Commission exhibits a similarly cavalier attitude toward concentration in its decision to raise the national cap.[128] It presents a hypothetical example of the national program acquisition market that depicts it as well up into the moderately concentrated range (HHI-1535). In the hypothetical, a mere increase of 3 percentage points in the market share of either of the two largest programmers would result in an increase in the HHI larger than the *Merger Guideline* threshold.

The public deserves better treatment under the Communications Act. The FCC cannot allow mergers that pose such a clear threat to the public interest in diversity and localism without scrutiny. Indeed, the Appeals Court in *Sinclair v. FCC* noted that the in 1995 the FCC has already argued that "The Commission observed that a merger-based standard, looking to the guidelines of the Department of Justice and the Federal Trade Commission, might be too low as

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[125] Order, para. 196.

[126] CFA/CU, Comments 2, pp. 179.

[127] Cooper, *ex parte,* May 21, 2003, Promoting the Public Interest Through Media Ownership Limits, pp. 23.

[128] Order, para. 523.

their purpose lay in defining the point at which antitrust scrutiny is required, and not in encouraging a wide array of voices and viewpoints."[129]

If the FCC had conducted a reasonable market structure analysis based on market shares of properly defined product and geographic markets that reflect the reality of media markets as depicted in the record, it would have concluded that most markets for news and information are highly concentrated. Under the public interest standard of the Communications Act, they cannot tolerate mergers.

The desire to provide certainty to the industry with a bright line test may be a laudable goal,[130] but it certainly should not trump the public interest standard of the Communications Act. Moreover, the Commission's repeated finding that the evidentiary record does not support a blanket prohibition on mergers does not justify its rules that are virtually a blanket approval of mergers.[131] It has missed the middle ground of a case-by-case approach. The imbalance in the Order is made even worse by the FCC's decision to allow broadcasters the opportunity to show that mergers not allowed under the bright line test are in the public interest, but to deny the public the right to show that mergers allowed under the bright line test are not in the public interest.

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[129] *Sinclair,* pp. 5, cited in Cooper, *ex parte,* May 21, 2003, Promoting the Public Interest, pp. 12.

[130] Order, paras. 80-85.

[131] Order, paras. 364, 366.

APPENDIX I: REASONABLE RULES CANNOT BE BASED ON UNREASONABLE ANALYSIS

A. Detailed Analysis of the FCC Examples

Table A-1 presents the results of our analysis of the distortion introduced into the proposed rule by the flaws in the Diversity Index. Taken together, these flaws result in a gross distortion in the assessment of the state of diversity and competition in media markets.

Even in the largest markets in the country, the FCC should not be pursuing a policy of blanket approval of mergers.

- For New York City, instead of an HHI of 373, a reasonable approach would produce an HHI of 1055 if the HHI is computed, as it should be, taking market share into account.
- In other words, instead of depicting New York City as having the equivalent of 27 equal-sized competitors, it should be seen as having about 10 when market share is considered. This is moderately concentrated and just at the level where antitrust authorities become concerned about mergers.
- For Charlottesville, VA, the smallest TV market considered, the distortion is even more troubling. Instead of an HHI of 1358, about halfway up the moderately concentrated zone of the HHI should be over 4200. Figure 3 shows this difference graphically. Instead of painting a picture of a market with the equivalent of over seven equal-sized competitors, the proper picture is just over three.

The differences in the larger markets, when one uses proper methods by accounting for market share, are informative. New York is more concentrated than Birmingham when market shares are considered because of the high level of cross-ownership in New York. In New York, eight of the largest owners are in two of the three media. In Birmingham, there is not one cross-ownership situation. There are also four times as many noncommercial TV stations in New York, but one and one quarter times as many commercial TV stations. The FCC's simple voice count approach tends to underweight cross-ownership by the largest players in the market and overweight small and non-commercial outlets. These stations are much less likely to do local news. Even if the FCC were to rely on a count of TV stations doing news, the picture it would get would be very different.

Thus, the FCC's conclusion about the health and diversity of local media markets is entirely a function of its faulty assumptions and analytically incorrect approach to market structure analysis.

B. Irrational Outcomes in Other Markets

The FCC's sample cities do not tell the entire story. While the FCC bases its rule on a DMA analysis, the examples are city-by-city and not properly defined.[132] To flesh out the illogical results of the Diversity Index, we examine state capitol DMAs. These are critically important DMAs for the purposes of civic discourse. As Table A-2 shows, we identify four types of anomalies that result from the FCC approach.

- The within-media anomalies for newspapers are the result of the failure to consider the audience or, in the case of TV, the audience and coverage of stations.
- The within-media anomalies for TV are the result of the failure to consider the audience and coverage of stations.
- The between-media anomalies result from multiple failures – audience, coverage and weighting.
- The merger anomalies result from the failure to apply the dominant firm analysis to cross-media mergers.

[132] Trenton newspapers are included in the New York analysis, when it is in the Philadelphia DMA. The New York analysis includes no Connecticut newspapers, when several are in the New York DMA.

Table A-1: Estimated Media Market Concentration Ratios (HHI) Under Various Assumptions About Market Structure And Media Weights

Designated Market Area		Concentration Analysis Assumptions						
		FCC DI	Changes in Individual Assumptions			Combined Changes		
Area	Rank		Use Audience Shares	Reweight Radio/ Internet	Internet is national	Reweight & Use Audience	Reweight & Use Internet Audience is national	Reweight & Use Internet is national TV News Voice Count
New York, NY	1	373	361	906	438	965	1055	725
Birmingham, AL	40	591	796	852	803	871	951	961
Altoona, PA	96	960	1384	1231	1413	1781	1987	1676
Charlottesville, VA	186	1358	2420	2045	2077	3823	4256	4256

Table A-2: Irrational Conclusions Resulting From Unrealistic Assumptions And Incomplete Analysis In The Order: State Capitol DMAs

DEFINITIONS:

DMA of State Capitol; (RANK of DMA)

1. Smallest newspaper compared to largest newspaper; anomaly results from failure to consider markets share. Circulation is total weekly divided by 7.
2. Smallest commercial, smallest largest non-commercial TV station compared to largest TV station; anomaly results from failure to consider market shares and coverage. TV stations are measured by average day part share, 9:00 AM to Midnight.
3. Weight of smallest newspaper compared to largest TV station: anomaly results from failure to consider market share, coverage and weights. Average daily circulation compared to TV viewership measured as households based on average commercial day-part share multiplied by households using television.
4. Smallest TV-TV merger disallowed compared to largest TV-newspaper merger allowed; anomaly results from failure to apply dominant firm analysis to cross media mergers. The station is the top in viewership. Newspaper is average daily circulation.

EXAMPLES:

ALBANY NY DMA (55)

1. Register Star with avg. daily circulation of 7,000 is equal to the Time Union with avg. daily circulation of 100,000
2. ABC with less than 1% TV market share and WMHT PBS with 2% TV market share are equal to NBC with 3% TV market share
3. Register Star avg. daily circulation of 7,000 is equal to 57% of NBC with avg. daily viewers of 55,000
4. TV station with a 37,000 daily viewers cannot merge with a TV station with 17,000 daily viewers, but a TV station with 55,000 viewers can merge with a newspaper with 100,000 readers

ANNAPOLIS MD IN BALTIMORE DMA (24)

1. Cecil Whig with avg. daily circulation of 10,000 is equal to the Baltimore Sun with avg. daily circulation of 325,000
2. ABC with 13% TV market share and MD PBS with 3% TV market share are equal to NBC with 28% TV market share
3. Cecil Whig with avg. daily circulation of 10,000 is equal to 133% of NBC with avg. daily viewers of 150,000
4. TV station with a 71,000 daily viewers cannot merge with a TV station with 54,000 daily viewers, but a TV station with 150,000 viewers can merge with a newspaper with 325,000 readers

AUGUSTA ME IN PORTLAND ME DMA (76)

1. Berlin Daily with avg. daily circulation of 6,000 is equal to the Portland Press Herald, with avg. daily circulation of 84,000

2. Fox with 1% TV market share and Maine PBS with 3% TV market share are equal to NBC with 41% TV market share
3. Berlin Daily with avg. daily circulation of 6,000 is equal to 95% of NBC with avg. daily viewers of 48,000
4. TV station with 21,000 daily viewers cannot merge with a TV station with 6,000 daily viewers, but a TV station with 48,000 avg. daily viewers can merge with a newspaper with 84,000 readers

BOISE ID (124)

1. The Argus Observer with avg. daily circulation of 6,000 is equal to the Idaho Statesman with avg. daily circulation of 70,000
2. UPN with 9% TV market share and KAID PBS with 4% TV market share are equal to NBC with 43% TV market share
3. Argus Observer with avg. daily circulation of 6,000 is equal to 150% of NBC with avg. daily viewers of 28,000
4. TV station with 11,000 daily viewers cannot merge with a TV station with 9,000 daily viewers, but a TV station with28,000 avg. daily viewers can merge with newspapers with 70,000 readers

BOSTON MA /CONCORD NH (6)

1. Athol Daily News with avg. daily circulation of 4,000 is equal to commonly owned Boston Globe/ Worcester Telegram with avg. daily circulation of 605,000
2. Pax with 1% TV market share and WGBH PBS with 3% TV market share are equal to NBC with 25% TV market share
3. Athol Daily with avg. daily circulation of 4,000 is equal to 50% of NBC with avg. daily viewers of 235,000
4. TV station with 192,000 daily viewers cannot merge with a TV station with 142,000 daily viewers, but a TV station with 235,000 avg. daily viewers can merge with newspaper with 605,000 readers.

DENVER CO (18)

1. Steamboat Today with avg. daily circulation of 8,000 is equal to the Denver Post with avg. daily circulation of 420,000
2. An independent TV station with less than 1% TV market share and KRMA PBS with 2% TV market share are equal to NBC with 26% TV market share
3. Steamboat Today with avg. daily circulation of 8,000 is equal to 50% of NBC with avg. daily viewers of 150,000
4. TV station with 100,000 daily viewers cannot merge with a TV station with 88,000 daily viewers, but a TV station with 152,000 avg. daily viewers can merge with newspaper with 420,000 readers.

INDIANAPOLIS IN (25)

1. Call Ledger with avg. daily circulation of 3,000 is equal to the commonly owned Indianapolis Star/Muncie Star Press with avg. daily circulation of 300,000
2. UPN with 7% TV market share and WFYI PBS with 3% TV market share are equal to CBS with 28% TV market share
3. Call Ledger with avg. daily circulation of 3,000 is equal to 45% of CBS with avg. daily viewers of 128,000

4. TV station with 64,000 daily viewers cannot merge with a TV station with 32,000 daily viewers, but a TV station with128,000 avg. daily viewers can merge with newspapers with 300,000 readers

LEXINGTON KY (65)

1. Corbin Times Tribune with avg. daily circulation of 5,000 is equal to the Lexington Herald Leaser with avg. daily circulation of 115,000
2. Pax with less than 1% TV market share and WKLE PBS with less than 1% TV market share are equal to co-owned CBS stations with 42% TV market share
3. Times Tribune with avg. daily circulation of 5,000 is equal to 130% of co-owned CBS stations with avg. daily viewers of 66,000
4. TV station with 29,000 daily viewers cannot merge with a TV station with 17,000 daily viewers, but a TV duopoly with 66,000 avg. daily viewers can merge with a newspaper with 115,000 readers

NASHVILLE TN (65)

1. Paris Post with avg. daily circulation of 5,500 is equal to the Tennessean with avg. daily circulation of 200,000
2. PAX with less than 1% TV market share and WNPT PBS with 3% TV market share are equal to co-owned Sinclair stations with 36% TV market share
3. The Paris Post with avg. daily circulation of 5,500 is equal to 100% of Sinclair stations with avg. daily viewers of 150,000
4. TV station with 80,000 daily viewers cannot merge with a TV station with 47,000 daily viewers, but a TV duopoly with 150,000 avg. daily viewers can merge with a newspaper with 200,000 readers

PROVIDENCE RI (48)

1. Westerly Sun avg. daily circulation of 10,000 is equal to the Providence Journal with avg. daily circulation of 175,000
2. Paxson with 1% TV market share and RI PBS with 1% TV market share are equal to NBC with 41% TV market share
3. Westerly Sun with avg. daily circulation of 10,000 is equal to 69% of ABC with avg. daily viewers of 110,000
4. TV station with 35,000 daily viewers cannot merge with a TV station with 24,000 daily viewers, but a TV station with 110,000 avg. daily viewers can merge with newspapers with 175,000 readers

TALLAHASSEE FL (107)

1. Thomasville Tribune with avg. daily circulation of 10,000 is equal to the Tallahassee Democrat avg. daily circulation of 50,000
2. UPN with less than 1% TV market share and WFSU PBS with less than 1% TV market share are equal to CBS with 59% TV market share
3. Thomasville Tribune with avg. daily circulation of 10,000 is equal to 204% of CBS with avg. daily viewers of 50,000
4. TV station with 12,000 viewers cannot merge with a TV station with 10,000 daily viewers, but a TV station with 50,000 avg. daily viewers can merge with newspapers with 50,000 readers

TOPEKA KS (138)

5. The Council Grove Republican with avg. daily circulation of 1,500 is equal to the Topeka Capital Journal with avg. daily circulation of 55,000
6. An independent with less than 1% TV market share and KTWU PBS with 3% TV market share are equal to CBS with 46% TV market share
7. The council Grove Republican with avg. daily circulation of 1,500 is equal to 55% of CBS with avg. daily viewers of 24,000
8. TV station with 7,000 viewers cannot merge with a TV station with 3,000 daily viewers, but a TV station with 24,000 avg. daily viewers can merge with newspapers with 55,000 readers

TRENTON NJ/WILMINGTON DE IN PHILADELPHIA PA DMA (6)

1. Phoenixville Phoenix with avg. daily circulation of 15,000 is equal to the Philadelphia Inquirer/Daily News, with avg. daily circulation of 405,000
2. Paxson with 1% TV market share and WHYY PBS with 3% TV market share are equal to ABC with 26% TV market share
3. Phoenix with avg. daily circulation of 15,000 is equal to 60% of ABC with avg. daily viewers of 395,000
4. TV station with 275,000 daily viewers cannot merge with a TV station with 200,000 daily viewers, but a TV station with 395,000 avg. daily viewers can merge with newspapers with 405,000 readers.